Supreme Court, U.S.
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No. 93-1706

In The

Supreme Court of the United States

October Term, 1993

JOHN CROSETTO, KENNETH J. DORAN, and DOUGLAS W. KAMMER,

Petitioners,

v.

STATE BAR OF WISCONSIN, STEPHEN L. SMAY, and NATHAN S. HEFFERNAN, SHIRLEY S. ABRAHAMSON, WILLIAM A. BABLITCH, WILLIAM G. CALLOW, LOUIS J. CECI, ROLAND B. DAY and DONALD W. STEINMETZ, Justices of the Wisconsin Supreme Court,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS STATE BAR OF WISCONSIN AND STEPHEN L. SMAY

*John S. Skilton
William M. Conley
Roberta F. Howell
Foley & Lardner
One South Pinckney Street
Post Office Box 1497
Madison, Wisconsin 53701-1497
(608) 257-5035

Attorneys for Respondents State Bar of Wisconsin and Stephen L. Smay

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

36 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED[1]

1. Did the Court of Appeals properly remand this matter for a determination of whether the subject matter jurisdiction of the federal courts extends to claims against the State Bar of Wisconsin?

2. Did the Court of Appeals properly determine that the Executive Director of the State Bar of Wisconsin is entitled to qualified immunity as a matter of law?

3. Did the Court of Appeals properly affirm the dismissal of petitioners' motion for declaratory relief challenging the dues reduction procedure for 1992-93?

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[1] Petitioners' list of questions presented includes questions addressed to the Court of Appeals' decision affirming dismissal of the claims against the Justices of the Wisconsin Supreme Court. The propriety of granting certiorari concerning those claims is not addressed in this response, although respondents join the defendant justices in opposing the petition.

LIST OF PARTIES AND RULE 29.1 LIST

The names of all parties to the proceeding in the Court of Appeals appear in the caption of this case. None of the parties is a corporation.

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BRIEF IN OPPOSITION OF RESPONDENTS STATE BAR OF WISCONSIN AND STEPHEN L. SMAY

The respondents State Bar of Wisconsin ("State Bar") and Stephen L. Smay ("Smay"), by their undersigned counsel, respectfully request that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 12 F.3d 1396. The District Court's order adopting the Report and Recommendation of the Magistrate Judge and dismissing this action is reported at 810 F. Supp. 966. The District Court's order dismissing petitioners' complaint against the defendant Justices of the Wisconsin Supreme Court is reported at 771 F. Supp. 224.

COUNTERSTATEMENT OF THE CASE

Petitioners' description of the "Nature of the Case" is materially incomplete and factually inaccurate. Contrary to petitioners' unsubstantiated, though oft-repeated, charges against the Justices of the Wisconsin Supreme Court and the State Bar, the undisputed factual record compels the conclusion reached by the courts below: that the Wisconsin Supreme Court and the State Bar have consistently acted from the inception of the integrated bar in Wisconsin to ensure that the State Bar is structured and operated in a manner that complies with the dictates

of state and federal law.[2] Indeed, the Wisconsin Supreme Court voluntarily suspended enforcement of its integrated bar rule for four years pending resolution of *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis.), *rev'd sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989) (challenging Wisconsin's integrated bar rule), and *Keller v. State Bar of California*, 496 U.S. 1 (1990) (challenging use of mandatory bar dues for political and ideological activities), rather than risk any arguable constitutional infringement to members of the bar. As the district court held below, petitioners' relentless attempts to paint a contrary picture through factual misstatements and unreasonable inferences are overwhelmed by this record.

A. Background.

1. Decision of the Wisconsin Supreme Court to integrate the Bar.

In 1943, the Wisconsin legislature enacted a bill directing that there "shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in

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[2] The misstatements and mischaracterizations in the petition are too numerous to address individually. Most are irrelevant to the questions presented for review in any event. Except for the mischaracterizations of the decisions below (which are apparent from even a cursory reading of the decisions), the State Bar and Smay have addressed petitioners' misstatements of fact numerous times below. The most complete response is found in Defendants' Reply to Plaintiffs' Response to Statement of Undisputed Facts (R.292).

the association shall be a condition precedent to the right to practice law in Wisconsin." Ch. 315, 1943 Wis. Laws (codified as Wis. Stat. § 256.31 (1943)). The Wisconsin Supreme Court construed the statute as an advisory legislative declaration that integration of the Bar would promote the general welfare of the state. *See Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943). The court nevertheless deferred the decision to integrate. *Id.* at 54-55, 11 N.W.2d at 625. Three years later, the court again declined to integrate the Bar. *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946).

Ten years later, the court noted that "too many lawyers have refrained or refused to join [the voluntary association], that membership in the voluntary association has become static, and that a substantial minority of the lawyers in the state are not associated with the State Bar Association." *In the Matter of the Integration of the Bar*, 273 Wis. 281, 283, 77 N.W.2d 602, 603 (1956). Thus, the court ordered integration of the Bar on an interim basis. *Id.* at 285, 77 N.W.2d at 604. Following a two-year trial period, the court made the integrated State Bar permanent. *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958).

2. Constitutional challenge to the integrated bar: *Lathrop v. Donohue.*

The Wisconsin Supreme Court soon reviewed the constitutionality of the integrated State Bar. *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960). In upholding the Bar's constitutionality, the court explained that "the State Bar is a public and not a private agency."

Id. at 242, 102 N.W.2d at 411. The court noted "[t]he only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process." *Id.* at 238, 102 N.W.2d at 408. The court quoted approvingly the declaration of its distinguished former chief justice, Marvin Rosenberry, in his 1943 decision in *Integration of Bar* "that the dues payable by a lawyer to an integrated bar imposed by state action are in the same category as an annual license fee imposed upon any occupation or profession which is subject to state regulation." *Id.* The court further noted that the integration rule and bylaws of the State Bar "do not compel the plaintiff to associate with anyone. . . . The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues. . . . " *Id.* at 237, 102 N.W.2d at 408.

This Court upheld the mandatory membership requirement in *Lathrop v. Donohue*, 367 U.S. 820 (1961). At the same time, a plurality of the Court (Justice Brennan, joined by Chief Justice Warren and Justices Clark and Stewart) found the record inadequate to decide the narrower issue of whether certain of the Bar's "political" activities violated plaintiff's First Amendment rights. Justices Harlan, Frankfurter and Whittaker concurred in the result, but rejected outright the notion that mandatory bar dues, even if used on legislative matters, could ever constitute a violation of a dissenting Bar member's constitutional rights.

3. More recent challenges and responses by the Wisconsin Supreme Court and State Bar: Accommodating Dissent.

Since *Lathrop*, the structure, purposes and activities of the State Bar have undergone repeated, careful review by the Wisconsin Supreme Court and by special committees appointed by that court. In July of 1976, the Wisconsin Supreme Court appointed a committee chaired by Judge Andrew Parnell ("Parnell Committee") to study and report on the Bar's activities and the question of whether to continue integration. The supreme court delivered its opinion on the report in *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv (1977).

Commenting on the resolutions of the Parnell Committee, the court expressed approval of the Bar's legislative activities, including "traditional lobbying." *Id.* at xxxix. The court advised the State Bar to bring "major issues of legislative policy" before the membership at annual and midwinter meetings, when possible. Recognizing the presence of "issues raised in *Lathrop*," the court carefully delineated the Bar's authority in legislative activities to include "matters concerning the administration of justice and the practice of law, including matters of substantive law on which the views of lawyers have special relevance. The guiding princip[le] . . . must always be the public interest." *Id.* at xxix-xl.

The court again addressed the issue of the integrated bar in *In Matter of Discontinuation of State Bar of Wisconsin as an Integrated Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980). Several State Bar members appeared and argued against continued integration. *Id.* After hearing oral argument,

the Wisconsin Supreme Court reaffirmed its approval of the Bar's activities and rejected the petitioners' request to make the State Bar of Wisconsin voluntary. *Id.* The court did, however, express its general hesitance about the State Bar's involvement with the Wisconsin Lawyers Political Action Committee ("LAWPAC"), a separately-formed and independently-funded political action committee, and ordered that a committee be formed to study the propriety of mandatory membership, whether the Bar's involvement with LAWPAC was permissible and possible alternatives to the integrated bar. *Id.* at 387, 286 N.W.2d at 603.

The committee, chaired by Attorney John Kelly ("Kelly Committee"), submitted its report to the supreme court on October 1, 1982. After holding a public hearing on the Kelly Report, the court reaffirmed its commitment to integration of the State Bar, but ordered that the Bar disassociate itself from LAWPAC. *Report Of Committee To Review The State Bar*, 112 Wis. 2d xix, 334 N.W.2d 544 (1983). Pursuant to that order, the State Bar severed all of its remaining ties with LAWPAC. *See* Affidavit of Stephen L. Smay in Support of Motion for Summary Judgment (R.269), ¶¶ 11-17.[3]

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[3] Petitioners continue to insist in their petition that there is some basis to contradict the evidence that the State Bar and Smay severed all ties with LAWPAC in 1983. However, as the district court found after carefully reviewing the record evidence, despite four years of discovery, petitioners "failed to come forward with any . . . real evidence of an actual, continuing relationship between the LAWPAC and the Wisconsin State Bar." 810 F. Supp. at 979 (App. 42a).

At the same time, the court ordered that hearings be held to institute a rebate procedure for those members dissenting from legislative positions taken by the State Bar. While the court recognized that the Bar's involvement in the legislative arena raised the spector of potential infringement, the court did not find that any infringement had in fact occurred, and approved the rebate procedure simply as a preventive measure. *Id.* at xxiii-iv, 334 N.W.2d at 548.

The court did not specify how the rebate procedure was to be implemented.[4] Instead, the court ordered public hearings on the matter. *In the Matter of the Amendment of State Bar Rules: SCR 10.03(5)*, 127 Wis. 2d xi, 374 N.W.2d XLV (1986). On February 28, 1985, the court ordered the Bar to consider four alternative rebate plans. An additional hearing was held on May 23, 1985. *Id.* Ultimately,

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[4] From the outset of this litigation, petitioners have asserted that the Supreme Court of Wisconsin reneged on a "promise" to institute a dues rebate program effective July 1, 1983. As "evidence" of this "promise," petitioners point to a March 28, 1984 Order of the supreme court. Petitioners make the same erroneous assertion on appeal. *See, e.g.*, Pet. 4-5. The March 28, 1984 order simply proposed "a procedure whereby a member of the State Bar of Wisconsin could obtain a refund of that portion of his or her dues spent by the State Bar on legislative matters." (*See* Appendix to Defendants' Brief in Support of Motion for Summary Judgment (R.273), Tab 10) Attached to the order was a "proposed rule establishing such procedure to be effective commencing with the State Bar's 1983-84 fiscal year." The court ordered a hearing to be held on the proposal on September 17, 1984. *Id.* At no point in the order, or subsequently, did the Wisconsin Supreme Court make any promise that any dues rebate procedure ultimately implemented would have an effective date of July 1, 1983.

the court adopted a dues reduction plan that, consistent with *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984), permitted objectors to deduct their pro rata share of dues expended for legislative activities at the outset of each fiscal year. *Id.*

On April 19, 1986, in response to *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the State Bar's Board of Governors passed a bylaw providing for an arbitration proceeding in the event of a dispute between the Bar and a member concerning the allocation of expenditures to "legislative activities" as defined under the court's dues reduction plan. This procedure was approved by the Wisconsin Supreme Court in *Petition to Review Bar Bylaw Amendments*, 139 Wis. 2d 686, 407 N.W.2d 923 (1987). In its decision, the court found, contrary to the contention of a number of dissident Bar members, that the State Bar bylaw established a mechanism to resolve any dispute with respect to the calculation of the dues reduction, and thus satisfied the constitutional requirements set forth in *Hudson* even assuming those requirements were "applicable to the case before us." *Id.* at 689-94, 407 N.W.2d at 925-27.

4. Suspension of the mandatory bar rule and *Keller v. State Bar of California*.

The State Bar remained integrated, with a dues reduction procedure in place, until 1988, when a federal district court declared the integrated bar in Wisconsin unconstitutional. *Levine v. Supreme Court of Wisconsin*, 679

F. Supp. 1478 (W.D. Wis. 1988). In the wake of that decision, the Wisconsin Supreme Court suspended enforcement of the mandatory membership rule on May 26, 1988. The suspension was maintained even after the Seventh Circuit reversed the lower court. *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), and remained in effect until July 1, 1992. *In Matter of State Bar of Wisconsin: Membership*, 169 Wis. 2d 21, 485 N.W.2d 225 (1992).

On June 4, 1990, this Court issued its decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990). Citing *Lathrop*, the Court reaffirmed the constitutionality of the integrated bar, 496 U.S. at 7, and held, for the first time, that the analysis set forth in its union and agency shop cases (*e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)) applied to integrated bars. *Id.* at 10-12. Thus, the Court held an integrated bar may "constitutionally fund activities germane to [the] goals [of regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside those areas of activity." *Id.* at 14. The Court also stated that "an integrated bar could certainly meet its *Abood* obligation [not to fund non-germane ideological activities with mandatory dues] by adopting the sort of procedures described in *Hudson*." *Id.* at 17.

5. Reintegration of the State Bar of Wisconsin.

Effective July 1, 1992, the Wisconsin Supreme Court reestablished the mandatory bar under a set of new Wisconsin Supreme Court rules and State Bar bylaws. *In*

Matter of State Bar of Wisconsin: Membership, 169 Wis. 2d 21, 485 N.W.2d 225 (1992).[5]

B. Course Of Proceedings Below.

Petitioners brought this lawsuit against defendants State Bar of Wisconsin, its executive director Stephen L. Smay, and the Justices of the Wisconsin Supreme Court exactly three months after the district court's decision in *Levine*. Petitioners purported to bring this suit as a class action on behalf of all members of the State Bar who allegedly were required to support the State Bar's past expenditures in violation of the First and Fourteenth Amendments.[6]

Petitioners sought approximately $500,000 in compensatory damages (allegedly representing the amount of mandatory dues spent on unconstitutional activities during fiscal years 1983 through 1987) and some $600,000 in punitive damages for defendants' alleged reckless disregard of petitioners' constitutional rights. (Complaint, R.2) In addition, petitioners sought to enjoin the State Bar from returning to mandatory status. (*Id.*)

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[5] The text of Wisconsin Supreme Court Rule ("SCR") 10.03(5)(b) and State Bar Bylaw Article I, Section 5 are set out in the Supplemental Appendix to this brief.

[6] Petitioners' first motion for class certification was denied without prejudice. (App. 56a-68a) Their second motion for certification was one of the pending motions dismissed by the district court in light of its decision on the merits. *See supra* note 7. Petitioners do not appear to seek review of the denial of their certification motion. *See* Pet. at i.

Following the *Keller* decision, the Justices of the Wisconsin Supreme Court brought a motion to dismiss the claims against them on the grounds that they were absolutely immune from suit for their quasi-legislative conduct and that there was no immediate threat of injury to the petitioners. The district court granted the motion on November 16, 1990. 771 F. Supp. 224.

Petitioners continued to press their claims against defendants State Bar and Smay. As the district court noted, the nature of petitioners' claims has remained "prolix and disjointed" despite repeated amendments to their complaint. 810 F. Supp. at 976 (App. 36a). Petitioners have maintained their challenge to the constitutionality of the State Bar's past expenditures of membership dues on a variety of activities, for which they seek substantial compensatory and punitive damages. While petitioners ultimately dropped their claim directly challenging the constitutionality of Wisconsin's integrated bar rule, they also continued to challenge any reinstatement of that rule.

On April 15, 1991, defendants State Bar and Smay filed a comprehensive motion for summary judgment, arguing that petitioners' claims for prospective relief against the suspended mandatory bar rule were moot. Defendants also argued that petitioners' claims for past damages (1) were barred by the doctrine of qualified immunity, (2) would result in an improper, retroactive application of *Keller* and (3) were further barred by petitioners' failure to object contemporaneously to the Bar's expenditures.

Over a year later, petitioners filed a second motion for preliminary injunction seeking to enjoin the reintegration of the mandatory bar in Wisconsin on the grounds that the newly-adopted procedures of the Wisconsin Supreme Court for preventing the use of mandatory dues for improper purposes under *Keller* were constitutionally inadequate.

On August 24, 1992, the magistrate judge issued a 36-page Report and Recommendation, recommending: (1) that the motion for summary judgment on petitioners' claims for damages resulting from past conduct should be granted on the grounds that the State Bar and Smay acted in good faith and are entitled to qualified immunity; (2) that petitioners' second motion for a preliminary injunction should be dismissed on the grounds that the new rules and bylaws under which the State Bar was to be reintegrated were facially valid, and that petitioners' claims that the fee calculation for fiscal 1993 made under those rules – which had not yet been reviewed by an impartial arbitrator – were not ripe; and (3) all other pending motions should be dismissed on the grounds that dismissal of the summary judgment and preliminary injunction motions rendered those motions moot.[7]

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[7] In addition to the motions discussed above, the following motions were encompassed by the magistrate judge's recommendation: plaintiffs' motion to vacate order denying class certification; plaintiffs' motion to strike insufficient defenses; plaintiffs' motion for preliminary injunction and declaratory ruling (concerning the rules effective 1986-88); plaintiffs' motions to reopen discovery; plaintiffs' motion for production of documents; plaintiffs' motion to amend final pretrial report; cross-motions for sanctions; and plaintiffs' second motion for

After considering petitioners' objections to the magistrate judge's report and defendants' response, the district court adopted the report and recommendation of the magistrate judge and ordered that this action be dismissed. Judgment was entered in favor of defendants on October 28, 1992.

The Court of Appeals affirmed the decision of the district court, except dismissal of the State Bar. Although it questioned whether the State Bar as an entity rather than a natural person was entitled to assert a qualified immunity defense, the Court of Appeals did not reach that issue. Instead it raised *sua sponte* the question of whether the subject matter jurisdiction of the federal courts extended to claims against the State Bar of Wisconsin. Noting the weight of authority holding state bars entitled to sovereign immunity, the Court of Appeals remanded to the district court for a determination of the State Bar's sovereign status. 12 F.3d at 1402 (App. 11a).

REASONS FOR DENYING THE WRIT

Although not altogether clear, petitioners appear to raise two principal arguments for why this Court should grant certiorari to review the Court of Appeals' decision concerning the State Bar and Smay. First, they argue that the decision below conflicts with established law because (a) the jurisdictional question of the Bar's immunity from

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preliminary injunction. Plaintiffs' second motion for declaratory judgment was filed after the magistrate judge's report was issued and before the district court dismissed the action. (R.378)

suit should not have been remanded for factual findings; (b) qualified immunity is not a question of law; and (c) the Court of Appeals' decision affirming the validity of SCR 10.03(5)(b) and State Bar Bylaw Article I, Section 5 (1992) is in conflict with *Keller* and two lower court decisions. Second, they claim that this case raises questions left open in *Keller* which must be resolved. Petitioners are wrong on both counts.

I. IT IS PETITIONERS' ARGUMENTS, NOT THE DECISION BELOW, WHICH CONFLICT WITH ESTABLISHED LAW.

A. The Court Of Appeals Properly Remanded For A Determination Of Jurisdiction Over The State Bar.

Petitioners' first claim of error is fundamentally at odds with the law concerning subject matter jurisdiction. It has been established without question for over a century that "on every writ of error or appeal the first and fundamental question is that of jurisdiction . . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it." *Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). *See also Pennhurst v. Halderman*, 465 U.S. 89, 99 n.8 (1984).

The Court of Appeals in this case properly raised that fundamental question concerning its jurisdiction over the State Bar, and determined that there were insufficient facts in the record to answer it. Accordingly, it remanded the case to the district court to make the necessary factual findings and answer the question in the first instance.

Petitioners' suggestion that this Court should expend its limited resources to review an issue which has yet to be decided by the courts below must be rejected.

B. Qualified Immunity Is A Question Of Law.

Petitioners' second argument seems to be that the question of Smay's immunity was improperly decided as a question of law. Petitioners' argument on this issue displays their misunderstanding of the nature of the defense of qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court "refashioned the qualified immunity doctrine in such a way as to 'permit the resolution of many insubstantial claims on summary judgment.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817).

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. . . . *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution *of the essentially legal question* whether the conduct of which the plaintiff complains violated clearly established law.

Id. (emphasis added).

As the courts below found, "before the *Keller* decision 'even the basic issue of the applicability of First Amendment protections to lawyers in an integrated bar was open to question.' . . . Notably, the California Supreme

Court was reversed by the Supreme Court of the United States on this point of law as late as 1990." 12 F.3d at 1404 (App. 15a-16a) (quoting magistrate judge's report, 810 F. Supp. at 977 (App. 39a)). "Prior to *Keller*, *Lathrop* was 'the last Supreme Court decision squarely to address the [F]irst [A]mendment rights of lawyers in an integrated bar.'" 810 F. Supp. at 977 (App. 39a-40a) (quoting *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986)). *See also Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 865 (1992) (the Court "establish[ed] for the first time [in *Keller*] that the principles it previously had developed for the permissible use of compulsory union dues are equally applicable for the use of mandatory bar dues.").

Thus, since the constitutional rights petitioners contend were violated were not clearly established before 1990, the Court of Appeals properly determined that Smay was entitled to qualified immunity for his conduct prior to that time. 12 F.3d at 1404 (App. 16a).[8]

C. The Dismissal Of Petitioners' Claims For Injunctive And Declaratory Relief Challenging The Bar's Dues Reduction Plan For 1992-93 Is Consistent With *Keller* And *Schneider*.

Although the petition lodges numerous complaints about the decisions below, petitioners' primary complaint appears to relate to their second motion for declaratory

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[8] In any event, the district court properly found that petitioners' claims were unsubstantiated. *See* 810 F. Supp. at 978-79 (App. 41a-42a).

judgment, which challenged the validity of the 1992-93 dues reduction plan.[9] They claim the dismissal should be reviewed by this Court because it is in conflict with *Keller*, the First Circuit's subsequent decision in *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), and an earlier decision of the New Hampshire Supreme Court in *Petition of Chapman*, 128 N.H. 24, 509 A.2d 753 (N.H. 1986). There is no such conflict.

First, the Wisconsin Supreme Court rule petitioners fault was not adopted by the Wisconsin Supreme Court until April 14, 1993, six months *after* the district court dismissed this action. *In the Matter of the Amendment of Supreme Court Rules: 10.03(5)(b)*, 174 Wis. 2d xiii (1993). Therefore, the rule was not before the Seventh Circuit when it rendered the decision challenged here. Petitioners are improperly attempting to use a petition for certiorari to press new challenges.

Second, as the courts below properly found, the rules and bylaws which *were* before them were expressly founded on the standard promulgated by this Court in *Keller*. 810 F. Supp. at 981 (App. 46a); 12 F.3d at 1405 (App. 17a).[10] For example, the rule's definition of those activities which may be funded with mandatory dues

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[9] Petitioners also sought a preliminary injunction to prevent the reintegration of the bar on the same grounds. It was in the context of that motion that the district court analyzed and rejected petitioners' claims. 810 F. Supp. at 980-82 (App. 45a-49a). Because the court properly found against petitioners on the merits of their claim, it denied their second motion for preliminary injunction and dismissed the second motion for declaratory judgment.

[10] Indeed, petitioners concede as much. *See* Pet. at 15 n.16.

states: "The State Bar may use compulsory dues only for activities reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services offered by members of the state bar." SCR 10.03(5)(b)(1). This is, in large part, a direct quote of this Court's language in *Keller*. *See* 496 U.S. at 14 ("the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State") (citation omitted), *and id.* (an integrated bar may "constitutionally fund activities germane to [the] goals [of regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside those areas of activity."). *See also In Matter of the State Bar of Wisconsin*, 169 Wis. 2d at 23-25, 485 N.W.2d at 226.

Further, the rules and bylaws which create the procedure for members to challenge the Bar's determination of chargeable activities incorporate all the requirements established in *Hudson* and approved in *Keller*. In *Hudson*, this Court established procedural safeguards which must be provided by a union collecting fair-share or agency fees to prevent "compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining." *Hudson*, 475 U.S. at 302. The required procedure must include: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the

amounts reasonably in dispute while such challenges are pending." *Id.* at 310. *Keller* approved those procedures for use by an integrated bar in meeting its obligation to not fund non-germane political and ideological activities with mandatory dues. *Keller*, 496 U.S. at 17.

SCR 10.03(5)(b) and State Bar Bylaw Article I, Section 5 more than meet these requirements. They require advance written notice of the activities determined to be chargeable and non-chargeable, the costs of those activities and how the costs were calculated; provide a procedure for challenges to the determination to promptly be heard by an impartial arbitrator; and allow challengers to defer payment of *any* dues until after the arbitrator's decision has been issued. 12 F.3d at 1405 (App. 18a).

Third, there is no conflict with *Schneider*. Like the Wisconsin procedure, the *Schneider* Court defined the activities which may be funded with mandatory dues by quoting *Keller*. *Schneider*, 917 F.2d at 640.

Finally, petitioners assert the Court should grant their petition because of a perceived conflict with the decision of the New Hampshire Supreme Court, issued several years *prior* to *Keller*, in *Petition of Chapman*. This argument makes no sense whatsoever. Even if there were such a conflict, it would be irrelevant. *Keller* is the most recent pronouncement of this Court concerning the constitutional use of mandatory bar dues and the protections which integrated bars must provide. *Keller*, not *Chapman*, is the law. Since the decision below is in complete accord with *Keller*, the petition for certiorari should be denied.

II. THE QUESTIONS LEFT UNANSWERED BY *KELLER* ARE NOT RAISED BY THIS CASE.

Petitioners' second basis for requesting that this case be reviewed is to resolve a question left unanswered in *Keller*, namely what specific activities constitutionally may be funded with mandatory dues. *See Keller*, 496 U.S. at 15 ("Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern."). On the record in this case, however, that issue is not presented.

When judgment in this case was entered, the arbitration proceeding challenging the Bar's application of SCR 10.03(5)(b) and Bylaw Article I, Section 5 for fiscal year 1992-93 had not yet been completed. Therefore, petitioners' challenges to the use of their mandatory dues for particular activities were not ripe and were dismissed. Although petitioners attempted on several occasions to bring the subsequent arbitrator's decision before the Court of Appeals, the court rejected petitioners' attempts to improperly expand the record and prolong this litigation. Thus "[t]he questions involving the power of . . . [the State] come here not so shaped by the record and by the proceedings below as to bring those powers before this Court as leanly and as sharply as judicial judgment upon an exercise of . . . [state] power requires." *Lathrop*, 367 U.S. at 847 (citations omitted).

It has been only four years since this Court's decision in *Keller*. Since then, the Court has denied the petition for certiorari in *Schneider*, ___ U.S. ___, 112 S. Ct. 865 (1992), and dismissed as improvidently granted the petition in *Gibson*, ___ U.S. ___ 112 S. Ct. 633 (1991), both of which raised similar constitutional challenges to integrated bars. Like *Schneider* and *Gibson*, there is nothing about this case which warrants further review by this Court.

CONCLUSION

For all of the reasons discussed above, respondents State Bar of Wisconsin and Stephen L. Smay respectfully submit that the petition for a writ of certiorari should be denied.

Dated this 25th day of May, 1994.

Respectfully submitted,

*John S. Skilton
William M. Conley
Roberta F. Howell
Foley & Lardner
One South Pinckney Street
Post Office Box 1497
Madison, Wisconsin 53701-1497
(608) 257-5035

Attorneys for Respondents
State Bar of Wisconsin and
Stephen L. Smay

*Counsel of Record